

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

COMBUSTION ENGINEERING, INC., )		
Plaintiff/Counterclaim )		
Defendant )		
v. )		
	)	
MILLER HYDRO GROUP, )		
Defendant/Counterclaim )		
Plaintiff )		
v. )		
	)	
	)	Civil No. 89-0168 P
KANSALLIS-OSAKE-PANKKI, )		
Party-in-Interest )		
	)	
and )		
	)	
ALDEN RESEARCH LABORATORY, )		
INC., )		
Counterclaim Defendant )		

**MEMORANDUM DECISION AND ORDER APPROVING ATTACHMENT**

The plaintiff seeks an order allowing it to attach the real and personal property of the defendant, including trustee process, in the amount of Ten Million Three Hundred Thirty-five Thousand Six Hundred Eighty-six Dollars and Thirteen Cents (\$10,335,686.13).<sup>1</sup> After notice to the defendant and hearing, and on affidavits, the court finds that there is a reasonable likelihood that the plaintiff will recover judgment, including interest and costs, in an amount equal to or greater than Ten Million Three Hundred Thirty-five Thousand Six Hundred Eighty-six Dollars and Thirteen Cents (\$10,335,686.13) and that there is no liability insurance or any property or credits attached by other writ of attachment or by trustee process shown by the defendant to be available to satisfy such judgment.

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<sup>1</sup> Although the plaintiff's motion recites \$10,355,686.13 as the amount sought, its initial supporting memorandum contains the figure \$10,335,686.13. Memorandum of Law in Support of Plaintiff's Motion for Approval of Attachment, Including Trustee Process at p. 9 (Memorandum #6). The sum of the four components making up the plaintiff's claim is, in fact, \$10,335,776.13.

The foregoing notwithstanding, the plaintiff is not entitled to the broad scope of attachment it seeks. Paragraph 3(a) of the Subordination Agreement executed by the plaintiff as of May 29, 1986 specifically provides that, with a single exception, the plaintiff may not receive, accept or retain any security for existing or future indebtedness and liabilities of the defendant in its favor until all obligations and liabilities owing by the defendant to certain banks, represented by party-in-interest Kansallis-Osake-Pankki ("KOP") as agent, up to an aggregate principal amount of \$38,000,000, plus certain fees, expenses and other amounts, is paid in full. The exception is that the defendant may grant the plaintiff security for its debt and liabilities on its real estate and equipment in the same form of documents as received by KOP with such modifications as KOP may request "to evidence the subordinated nature thereof." Subordination Agreement, & 16. Clearly, the Subordination Agreement contemplates that the plaintiff may hold a security interest in the defendant's real estate and equipment as long as that interest is in every respect subordinated to the security held by KOP and the other participating banks.<sup>2</sup> Therefore, I conclude that the plaintiff is entitled to an attachment on the defendant's real estate and equipment only,<sup>3</sup> such attachment to be subordinated

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<sup>2</sup> The defendant and KOP argue that & 5 of the Subordination Agreement prohibits the plaintiff from seeking and obtaining any attachment without KOP's consent. That paragraph provides in relevant part that the plaintiff "will not take any action to enforce, foreclose or otherwise realize upon any such security interest or lien." (Emphasis supplied). This provision simply restricts the plaintiff's ability to assert any enforcement rights with respect to any security interest it might acquire pursuant to & 16. Any other reading would render & 16 meaningless. As a pre-judgment attaching creditor, the plaintiff presently has no such enforcement rights, see A. Horton & P. McGehee, Maine Civil Remedies, ' 26.1 (1989), and does not purport to assert any.

<sup>3</sup> As the plaintiff has not indicated that any of the defendant's equipment is in the possession of a third-party, but rather has made clear that its interest in trustee process is for the purpose of reaching proceeds from the defendant's sale of electricity to Central Maine Power Company, a property interest which under the Subordination Agreement may not be attached, I do not authorize attachment on trustee process.

at all times to the Superior Indebtedness as defined in the Subordination Agreement.<sup>4</sup>

Accordingly, it is ORDERED that attachment may be made by the plaintiff against the real estate and equipment of the defendant in the amount of Ten Million Three Hundred Thirty-five Thousand Six Hundred Eighty-six Dollars and Thirteen Cents (\$10,335,686.13). In all other respects, the plaintiff's motion for approval of attachment including trustee process is DENIED.

Dated at Portland, Maine this 14th day of February, 1990.

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David M. Cohen  
United States Magistrate

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<sup>4</sup> The plaintiff asserts that it is relieved of any restrictions imposed by the Subordination Agreement because the defendant has breached it by failing to provide the plaintiff with a note evidencing its claimed entitlement to an incentive bonus and with security for that note. Plaintiff's Reply Memorandum in Support of Its Motion for Attachment and Trustee Process at pp. 7-9 (Memorandum #19). However, neither the Subordination Agreement nor any other document before the court conditions the effectiveness of the Subordination Agreement on the delivery of such note and security.